

THE PITTSBURG & MIDWAY COAL MINING CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
NAVAJO TRIBE OF INDIANS (INTERVENOR)

IBLA 87-577, 87-649

Decided June 28, 1990

Consolidated appeals from a decision of Administrative Law Judge Harvey C. Sweitzer granting in part and denying in part application for review of a surface coal mining permit (TU 6-2-PR), and a decision vacating Notice of Violation No. 86-02-030-6 issued by OSMRE (TU 7-6-R).

Reversed in part, set aside in part, and remanded.

1. Indians: Lands: Fee Lands--Indians: Lands: Tribal Lands--Surface Mining Control and Reclamation Act of 1977: Federal Lands: Generally--Surface Mining Control and Reclamation Act of 1977: Indian Lands: Generally--Words and Phrases

"Federal lands." "Indian lands." The term "Indian lands," as defined by sec. 701(9) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. § 1291(9) (1982)), includes non-Federal lands satisfying the statutory criteria that they either be situated within the exterior boundaries of a Federal Indian Reservation or held in trust for or supervised by an Indian tribe. By the same token, lands owned by the United States are "Indian lands" under SMCRA only if they meet these statutory criteria.

"Indian lands" are specifically excepted from the definition of "Federal lands." Therefore, under SMCRA, the categories of "Indian lands" and "Federal lands" are mutually exclusive. Thus, a holding that lands are not "Indian lands" because neither the surface nor the mineral estate is "Federal lands" is properly reversed.

2. Indians: Lands: Fee Lands--Indians: Lands: Tribal Lands--Surface Mining Control and Reclamation Act of 1977: Indian Lands: Generally

Lands located outside a Federal Indian reservation, the surface estate of which is owned by an Indian tribe and the mineral estate of which is privately owned, are "Indian lands" within the meaning of sec. 701(9) of SMCRA (30 U.S.C. § 1291(9) (1982)), and thus are subject to OSMRE's jurisdiction.

3. Administrative Procedure: Hearings--Hearings--Intervention--Rules of Practice: Hearings--Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Intervention

Where an application for review of a permit is pending before an Administrative Law Judge and the permittee and OSMRE agree to the nature of the issue remaining after settlement by them of the other issues raised by the application, such agreement will not preclude consideration of any of the settled issues at the behest of an intervenor in the proceeding, whether interven-tion occurred before or after the settlement.

4. Administrative Procedure: Hearings--Hearings--Indians: Lands: Generally--Indians: Lands: Allotments: Gener-ally--Rules of Practice: Hearings--Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Indian Lands: Generally

The Board will remand a case to an Administrative Law Judge on the question of fact whether lands allotted to individual Indians and lands owned by the United States are "Indian lands" under sec. 701(9) of SMCRA (30 U.S.C. § 1291(9) (1982)), i.e., whether they are "supervised by an Indian tribe" within the meaning of that statute, if that question was not addressed by the Judge.

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OPINION BY ADMINISTRATIVE JUDGE BYRNES

The Pittsburg & Midway Coal Mining Company (P&M), Navajo Tribe of Indians (Tribe), and Office of Surface Mining Reclamation and Enforce-ment (OSMRE) have all appealed from a decision of Administrative Law Judge Harvey C. Sweitzer, dated June 1, 1987, granting in part and denying in part P&M's application for review of permit No. NM-0001 issued by OSMRE, authorizing P&M's surface coal mining operation at the McKinley Mine situated in McKinley County, New Mexico. OSMRE has also appealed from another decision of Judge Sweitzer, dated June 2, 1987, vacating Notice of Viola-tion (NOV) No. 86-02-030-6, issued by OSMRE to P&M on September 30, 1986, for alleged violations at the same location, the McKinley Mine. The same question is raised by these appeals, i.e., whether certain of the lands covered by permit No. NM-0001 and the lands named in NOV No. 86-02-030-6 constitute "Indian lands" within the meaning of section 701(9) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C.

§ 1291(9) (1982), such that OSMRE had jurisdiction to issue the permit or the NOV under the Federal program for Indian lands (30 CFR Subchapter E). Accordingly, they are hereby consolidated. The statutory term "Indian lands" is defined in full as "all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe." 30 U.S.C. § 1291(9) (1982).

This dispute began with issuance by OSMRE of permit No. NM-0001 to P&M on March 7, 1986. Section 2 of that permit provides that the

permittee is authorized to conduct surface coal mining and reclamation operations on Indian lands * * * situated in the State of New Mexico, McKinley County, and located within: T. 16 N., R. 20 W., all or portions of sections 4, 5, 6, 7, 8, 10, 15, 16, 17, 18, 20, 21, 22, 23, 26, 27, and 28; T. 16 N., R. 21 W., all or portions of sections 1, 2, 11, 12, 13, and 14; T. 17 N., R. 20 W., all or portions of sections 31, 32, 33, and 34; T. 17 N., R. 21 W., portions of section 36; and that portion of the Navajo Indian Reservation approximately equivalent to T. 17 N., R. 20 W. and T. 17 N., R. 21 W., New Mexico Principal Meridian.

Section 2, in effect, includes in the permit area lands situated both to the north and south of the recognized southern boundary of the Navajo Indian Reservation. ^{1/} This recognized boundary runs along the north side of secs. 31 through 36, in T. 17 N., R. 20 W. There is no dispute that lands to the north of the boundary are Indian lands. The southern portion of the McKinley Mine is situated south of the boundary and is often referred to as the South McKinley Mine. The jurisdictional authority over these lands is in dispute.

On April 14, 1986, P&M filed its application for review of the permit, in which it challenged a number of the provisions of the permit. In the case of section 2 of the permit, P&M contended that OSMRE had improperly asserted "primary permitting jurisdiction" over the lands to the south of the recognized boundary, and that section 2 should be revised to eliminate these lands. P&M argued that these lands are located outside the boundaries of the Navajo Indian Reservation and that primary permitting jurisdiction over them therefore resides not with OSMRE, but in the State of New Mexico, by virtue of a cooperative agreement between OSMRE and the New Mexico Mining and Minerals Division (MMD).

Pursuant to two partial settlement agreements submitted to the Hearings Division on June 2 and August 7, 1986, P&M and OSMRE stipulated to the resolution of all of P&M's objections to permit No. NM-0001 with one notable exception, that concerning OSMRE's jurisdiction to issue the permit. These

^{1/} As discussed below, this boundary is disputed by the Tribe. For convenience, we shall allude to it as the "recognized boundary."

settlement agreements were ultimately approved by Judge Sweitzer in his June 1, 1987, decision, at page 18. However, the Tribe did not participate in these agreements.

Previously, on June 16, 1986, the Tribe filed a petition for leave to intervene in the pending permit review proceeding. The petition was not opposed by either P&M or OSMRE. By order dated August 7, 1986, Judge Sweitzer granted the petition pursuant to 43 CFR 4.1110, thereby according to the Tribe the status of "party intervenor."

As enunciated by Judge Sweitzer in a January 9, 1987, order to show cause regarding adoption of a briefing schedule, the only issue remaining for resolution as a result of the settlement agreements concerned "the question of OSM[RE's] jurisdiction over lands not within the [recognized] boundary of the Navajo [Indian] Reservation but owned in fee by the Navajo Tribe." In their responses to that order, P&M and OSMRE initially agreed with Judge Sweitzer's framing of the issue. The Tribe, however, objected, contending that the remaining issue concerned whether OSMRE had jurisdiction over all of the lands included in the McKinley mine, including lands encompassed by "Indian trust allotments." The Tribe took the position that all of the mine is situated within the exterior boundaries of the Navajo Indian Reservation and, thus, that the mine constitutes "Indian lands."

In a March 9, 1987, memorandum to Judge Sweitzer, with accompanying stipulations signed by OSMRE and P&M, counsel for OSMRE indicated that P&M and OSMRE had revised their position concerning what lands were properly the subject of the dispute between them regarding whether OSMRE had jurisdiction to issue the permit for lands south of the recognized border. OSMRE asserted jurisdiction both over lands the surface estate of which was owned in fee simple by the Tribe, 2/ and over "any allotted lands * * * which are supervised or held in trust for the Navajo Tribe." 3/ P&M disputed this assertion of jurisdiction. However, P&M and OSMRE agreed that all other lands south of the recognized boundary mentioned by section 2 of permit No. NM-0001 were not "Indian lands" subject to OSMRE's jurisdiction. 4/ Significantly, however, the Tribe did not enter into these stipulations.

2/ The stipulations identified lands south of the recognized bound-ary of the Navajo Indian Reservation, the surface estate of which was owned in fee simple by the Tribe, as all or portions of sec. 5, T. 16 N., R. 20 W.; all or portions of sec. 11, T. 16 N., R. 21 W.; and all or portions of sec. 33, T. 17 N., R. 20 W., New Mexico Principal Meridian, McKinley County, New Mexico. These lands will henceforth be referred to as "split estate lands."

3/ Counsel for OSMRE identified these allotted lands as all or portions of secs. 4, 8, 10, 16, 18, 20, 22, 26, and 28, T. 16 N., R. 20 W.; all or portions of secs. 12 and 14, T. 16 N., R. 21 W.; all or portions of secs. 32 and 34, T. 17 N., R. 20 W.; and portions of sec. 36, T. 17 N., R. 21 W., New Mexico Principal Meridian, McKinley County, New Mexico. These lands will henceforth be referred to as "allotted lands."

4/ The remaining lands may be described as all or portions of secs. 6, 7, 15, 17, 21, 23, and 27, T. 16 N., R. 20 W.; all or portions of secs. 1, 2, and 13, T. 16 N., R. 21 W.; and all or portions of sec. 31, T. 17 N., R. 20 W., New Mexico Principal Meridian, McKinley County, New Mexico.

No hearing was held before Judge Sweitzer in the permit review proceeding. Instead, the matter was submitted to him on the basis of extensive written briefs filed by the parties.

In his June 1, 1987, decision, Judge Sweitzer initially concluded that the question of whether all the lands covered by section 2 of permit No. NM-0001 are situated within the Navajo Indian Reservation, as urged by the Tribe, was not appropriate for resolution in an administrative forum. Accordingly, he held that, "for purposes of this decision, the [lands south of the recognized boundary] are deemed to lie outside the currently recognized boundaries of the Navajo Indian Reservation" (Decision at 4, emphasis in original).

Judge Sweitzer then turned to the question of whether these lands could nevertheless be deemed to be "Indian lands" within the meaning of section 701(9) of SMCRA by virtue of the fact that they were "all lands including mineral interests held in trust for or supervised by an Indian tribe." After reviewing the legislative history of section 701(9) of SMCRA and relevant Departmental rulemaking, he concluded that lands out-side a Federal Indian reservation are properly considered "'Indian lands' if either the surface or mineral estate is Federal land held in trust for or supervised by an Indian tribe" (Decision at 14). However, he stated that "no lands that are not also 'Federal lands' [, as such lands are defined by section 701(4) of SMCRA, 30 U.S.C. § 1291(4) (1982),] can be 'Indian lands.'" Thus, he held that "'Indian lands' is a subset of * * * 'Federal lands'" (Decision at 14). ^{5/}

Applying this standard, Judge Sweitzer addressed the "split estate lands" south of the recognized boundary, in which the Tribe owns the surface estate in fee simple, and an affiliate of the Santa Fe Pacific Railroad Company (Santa Fe) owns the mineral estate. He concluded that these split estate lands are not "Indian lands" because "neither the surface nor the mineral estate is Federal lands (either held in trust for or supervised by the Tribe)" (Decision at 17).

Judge Sweitzer also considered the status of "allotted lands" south of the recognized boundary, the surface estate of which is held in trust for individual Navajo Indians, rather than for the Tribe. Relying on a judicial settlement discussed more fully below, he concluded that these allotted lands are not "Indian lands" because, although they are Federal lands, they are "not held in trust for the Tribe * * * [but are] allotted to individual Indians," and because the Tribe had failed to establish that they are supervised by the Tribe.

With respect to most of the remaining lands covered by section 2 of permit No. NM-0001 where the Tribe asserted "no ownership or beneficial interest" in either the surface or mineral estate, Judge Sweitzer, noting

^{5/} "Federal lands" are defined as "any land, including mineral interests, owned by the United States without regard to how the United States acquired ownership of the land and without regard to the agency having responsibility for management thereof, except Indian lands." 30 U.S.C. § 1291(4) (1982).

the concurrence of P&M, OSMRE, and the Tribe, effectively concluded that these lands are not "Indian lands" (Decision at 14). Judge Sweitzer, however, excepted all or portions of secs. 6 and 22, T. 16 N., R. 20 W., New Mexico Principal Meridian, McKinley County, New Mexico, from his conclusion that the remaining lands are not "Indian lands." Rather, he concluded that these excepted lands are "Indian lands" because they are Federal lands which are supervised by an Indian tribe by virtue of the fact that "[g]razing upon these lands is administered by the Tribe, pursuant to a cooperative agreement." Id. at 17. ^{6/}

Accordingly, Judge Sweitzer denied P&M's application for review of the permit with respect to the lands over which OSMRE was deemed to have jurisdiction to issue a permit because they constitute "Indian lands" within the meaning of section 701(9) of SMCRA (viz., all or portions of secs. 6 and 22), but he otherwise granted P&M's application with respect to the remaining lands south of the recognized boundary covered by section 2 of permit No. NM-0001 where OSMRE was deemed to lack jurisdiction because they did not constitute "Indian lands." All of the parties appearing before Judge Sweitzer have appealed from his June 1987 permit review decision. These appeals have been docketed as Pittsburg & Midway Coal Mining Co., IBLA 87-577.

During the pendency of the permit review proceeding, on September 30, 1986, OSMRE Inspector Ron Sassaman conducted an inspection of the McKinley Mine. As a result of the inspection, he issued NOV No. 86-02-030-6 citing violations of the regulations pertaining to sediment control and drainage in the "CDK area" located south of the recognized boundary of the reservation in sec. 5, T. 16 N., R. 20 W. On November 3, 1986, P&M filed an application for review, request for temporary relief, and a request for an evidentiary hearing concerning the NOV with the Hearings Division, Office of Hearings and Appeals, pursuant to 43 CFR 4.1160 and 4.1260. By agreement of the parties (P&M and OSMRE), an evidentiary hearing was deferred until the issue of "Indian lands" was decided. On June 2, 1987, Judge Sweitzer decided the appeal on this issue based on his decision on the permit, discussed above, and vacated the NOV because it was issued for "non-Indian lands" over which OSMRE lacked authority. From that decision, OSMRE filed an appeal to this Board on July 9, 1987, which was docketed as The Pittsburg & Midway Coal Mining Co. v. OSMRE, IBLA 87-649.

[1] We recently dealt with the question of what constitutes "Indian lands" under section 701(9) of SMCRA in Valencia Energy Co., 109 IBLA 40, 96 I.D. 239 (1989). ^{7/} That case involved an appeal from a decision by the Director, Albuquerque, New Mexico, Field Office, OSMRE, which concluded that lands encompassed by a proposed surface coal mining operation constituted "Indian lands" where the surface estate was owned in fee simple by the Tribe and the mineral estate was owned by Santa Fe.

^{6/} We shall refer to these lands as the "grazing lands."

^{7/} Appeal filed, State of New Mexico v. Lujan, Civ. No. 89-0758 M (D.N.M. June 26, 1989).

In reviewing the propriety of that determination, we held that lands within a particular State that are subject to the regulation of surface coal mining operations perforce fall into "one of three possible classifications." Thus, we stated that land can be classified as either "Federal lands," "Indian lands," or "lands within any State" under section 701 of SMCRA. Moreover, we noted that the three categories of land established by section 701 of SMCRA are mutually exclusive. Thus, Judge Sweitzer's conclusion that "no lands that are not also 'Federal lands' can be 'Indian lands'" (Decision at 14) is at odds with our holding in Valencia and must be reversed. Rather, "Indian lands" are expressly excepted from the definition of "Federal lands." See 30 U.S.C. § 1291(4) (1982). Therefore, Judge Sweitzer's conclusion that the split estate lands herein are not "Indian lands" because neither the surface or mineral estate is Federal land and is held in trust for or supervised by an Indian tribe, must similarly fall.

This is not to say that lands, including mineral interests, owned by the United States can never be deemed to constitute "Indian lands." Such lands, presuming that they satisfy the criteria of section 701(9) of SMCRA, would constitute "Indian lands," which are thereby excepted from the category of "Federal lands." However, "Indian lands" encompass not just lands, including mineral interests, owned by the United States (as Judge Sweitzer held), but may also include non-Federal lands which satisfy the criteria that they are either situated within the exterior boundaries of a Federal Indian Reservation or held in trust for or supervised by an Indian tribe. ^{8/} It is, therefore, erroneous to conclude that "Indian lands" are drawn only from the category of "Federal lands" and, thus, must also be what would otherwise be considered "Federal lands." What classification applies in the case of a particular parcel of land has a direct bearing on whether the primary authority for the regulation of surface coal mining operations on that land is the Federal or State Government. Valencia Energy Co., *supra* at 45-46, 96 I.D. at 242-43. In the case of New Mexico, the State has assumed primary jurisdiction for the regulation both of "lands within any State," by virtue of the conditional approval of its State program (30 CFR 931.10), and of "Federal lands," by virtue of the execution of a cooperative agreement between the State and the Secretary of the Interior (30 CFR 931.30). By contrast, we noted, "Indian lands" in New Mexico remain subject to the jurisdiction of the Federal Government in the absence of the

^{8/} In concluding that "Indian lands" must also be "Federal lands," Judge Sweitzer relied largely on the explanation in the legislative history of SMCRA for inclusion of the word "Federal" in the definition of "Indian lands." According to that explanation, the reason for inclusion of the word "Federal" was to make clear that "Indian lands" do not include non-Federal lands, *i.e.*, lands in which the United States has no interest in either the surface or mineral estate. However, as the definition of "Indian lands" now reads, this limitation applies only in the case of lands within the exterior boundaries of an Indian reservation such that the reservation must be a "Federal Indian reservation" and not in the case of lands held in trust for or supervised by an Indian tribe. 30 U.S.C. § 1291(9) (1982).

assumption of jurisdiction by an Indian regulatory authority, which has not occurred.

[2] This still leaves unresolved the question of whether the split estate lands located outside the boundary of an Indian reservation, where the Tribe owns the surface in fee simple, are "Indian lands" under section 701(9) of SMCRA and, thus, subject to the jurisdiction of OSMRE. That question was answered by the Board in Valencia. Therein, we concluded that similar lands are "Indian lands" because the Tribe's ownership of the surface estate in fee simple renders the land "supervised" by the Tribe within the meaning of section 701(9) of SMCRA. Valencia Energy Co., supra at 65, 96 I.D. at 253.

In reaching that conclusion, we rejected one of the two principal contentions made by P&M here, viz., that the definition of "Indian lands" does not apply to lands outside a Federal Indian reservation where an Indian tribe owns only the surface estate, because the statutory language defining "Indian lands" as "all lands including mineral interests" requires that the tribe also own the mineral estate. See Valencia Energy Co., supra at 54, 96 I.D. at 247. Relying on Montana v. Clark, 749 F.2d 740 (D.C. Cir. 1985), cert. denied, 474 U.S. 919 (1985), in which the court effectively held that lands in which an Indian tribe owns only the mineral estate nevertheless may be "Indian lands" under section 701(9) of SMCRA, we concluded in Valencia that this case "totally refutes * * * [the] argument that [section 701(9) of SMCRA] only applies when both the surface fee and the mineral estates are conjoined." Valencia Energy Co., supra at 64 n.12, 96 I.D. at 252 n.12. Nor is there anything in Montana to indicate that ownership of the mineral estate is a prerequisite for concluding that lands constitute "Indian lands." Rather, as we noted in Valencia, the court read the definition of "Indian lands" broadly to cover "all lands in which the Indians have an interest." Montana v. Clark, supra at 752. As we pointed out in Valencia, the legislative history of SMCRA offers some support for the conclusion that ownership of the surface estate is sufficient (see 121 Cong. Rec. H13377 (May 7, 1975) (colloquy of Representatives Melcher and Udall)). However, a strong inference can also be drawn from OSMRE's implementation of this statute.

OSMRE's interpretation of the regulation that implements section 701(9) has been consistent and plain (see 43 FR 41801 (Sept. 18, 1978) and 44 FR 14912 (Mar. 13, 1979)). OSMRE interprets the definition of Indian lands to include a comma between the word "lands" and the phrase "including mineral interests" in both sentences of the section. By adopting the exact language that Congress enacted, OSMRE cannot be said to have undermined congressional intent, as alleged by P&M. Its interpretation of the meaning of this exact wording is set out in the preamble to the final regulation. This interpretation is entitled to be given great deference. Sun Exploration & Production Co. 112 IBLA 373, 386 (1989); Udall v. Tallman, 380 U.S. 1, 16 (1965). While it cannot be said that P&M's plain reading of the statutory language is totally implausible, 9/ it is not P&M, but OSMRE,

9/ OSMRE's argument regarding these commas is misplaced. It is OSMRE's responsibility to explain why the statute, on its face, does not plainly

that is charged with implementing the intent of the Act. The Board in Valencia concluded that OSMRE's interpretation of the language was reasonable, as we do here. P&M has not persuaded us to disturb that ruling, nor have they persuaded us that Congress had in mind an interpretation other than the one advanced by OSMRE when it enacted the language of 701(9). There is nothing in the record to show that Congress chose to foreclose the interpretation advanced by OSMRE.

In addition, in Valencia, we effectively silenced P&M's other major contention that, even assuming that "Indian lands" can encompass ownership of just the surface estate of lands, mere ownership by an Indian tribe does not render the lands "supervised" by an Indian tribe within the meaning of section 701(9) of SMCRA. See Valencia Energy Co., *supra* at 65, 96 I.D. at 253. It is clear that supervision, consistent with valid Government regulation, is one of the "sticks" in the bundle of rights that enable individuals to "possess, use and dispose of" private property which is encompassed in the concept of fee simple ownership of land. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-36 (1982); G. Thompson, Commentaries on the Modern Law of Real Property § 3 (1964). P&M has not persuaded us to depart from this conclusion by attempting to construe the word "supervision" to mean completely unfettered management of land. An owner is free to "supervise" activity on private property consistent with valid Government regulation.

Finally, in Valencia, we noted that the Tribe had contended there, as it does here, that split estate lands must be deemed to be "Indian lands" under section 701(9) of SMCRA because they are situated within the exterior boundaries of the Navajo Indian Reservation. The Tribe's contention was premised on the same argument as raised here, viz., that the split estate lands, which were included in the reservation by Exec. Order No. 709, as modified by Exec. Order No. 744, were not subsequently excluded from the reservation by Exec. Order Nos. 1000 and 1284 issued pursuant to section 25 of the Act of May 29, 1908, 35 Stat. 457 (1908). We concluded in Valencia, however, that it was unnecessary to address the Tribe's contention in light of our conclusion that the split estate lands were deemed to be "Indian lands" by virtue of being "supervised by an Indian tribe" under section 701(9) of SMCRA. So it is here.

Accordingly, we conclude that the split estate lands covered by section 2 of permit No. NM-0001 and at issue in connection with NOV 86-02-030-6 constitute "Indian lands" under section 701(9) of SMCRA and, thus, are subject to the jurisdiction of OSMRE with respect to the regulation of surface coal mining operations, including the issuance of surface coal mining permits. We, therefore, reverse Judge Sweitzer's June 1, 1987, decision insofar as it granted P&M's application for review of its permit on the basis of his conclusion that such lands are not "Indian lands." Likewise, Judge

fn. 9 (continued)

state what OSMRE interprets it to say. If the difference is, as OSMRE contends, "the unexplained omission of a comma," OSMRE has the burden of proving the comma should be read into the statute. OSMRE has met this burden by its regulatory issuances.

Sweitzer's June 2, 1987, decision vacating NOV No. 86-02-030-6 is reversed, the NOV is hereby reinstated, and the case is remanded to Judge Sweitzer for an evidentiary hearing.

The permit case, however, involves more than split estate lands. As noted above, it also involves allotted lands and the remaining lands covered by section 2 of permit No. NM-0001 which the Tribe does not own and in which it has no beneficial interest, including certain grazing lands. The case of *Valencia* did not reach the question of whether these types of lands constitute "Indian lands" within the meaning of section 701(9) of SMCRA.

Before proceeding to address the question of whether these lands constitute "Indian lands" under section 701(9) of SMCRA, it is necessary to consider P&M's and OSMRE's contention that this question was not properly before Judge Sweitzer and, therefore, should not be addressed by the Board.

[3] P&M and OSMRE contend that the question of whether lands other than split estate lands constitute "Indian lands" was not properly before Judge Sweitzer because that question was "not in issue between OSMRE and P&M" (P&M's Appeal Brief at 37). Based upon our review of the history of this case, it is clear that, at the time the case was finally submitted to Judge Sweitzer for disposition, this question, although it had originally been in dispute, was no longer "in issue between OSMRE and P&M." Nevertheless, we conclude that the question was very much still "in issue" between OSMRE and P&M, on the one hand, and the Tribe on the other.

In its application for review, P&M initially challenged OSMRE's assertion of jurisdiction over "all other lands described in Section 2" of permit No. NM-0001, excluding from its challenge only lands north of the recognized boundary that are undoubtedly within the Navajo Indian Reservation (Application for Review at 2). As noted above, "all other lands" encompasses not only split estate lands but also allotted and other lands. Thus, it is clear that P&M was originally challenging OSMRE's assertion of jurisdiction over all of the non-reservation lands covered by the permit. ^{10/}

In their responses to Judge Sweitzer's January 9, 1987, order to show cause, P&M and OSMRE changed the focus of the dispute between them, stating that it concerned only OSMRE's assertion of jurisdiction over non-reservation lands which are owned in fee simple by the Tribe, the so-called split estate lands. Thereafter, on March 11, 1987, OSMRE submitted stipulations signed by representatives of P&M and OSMRE which confirmed, at page 3, that the dispute between them concerned only OSMRE's assertion of jurisdiction over split estate lands, and that they were otherwise agreed that

^{10/} It is clear, however, that at the time of submitting its application for review, P&M regarded "all other lands" as falling into the category of "Federal lands." Thus, P&M stated that primary jurisdiction over such lands "rests with the State of New Mexico by virtue of the Cooperative Agreement between OSMRE and [MMD]" (Application for Review at 2). In any case, P&M sought to challenge any assertion of jurisdiction of OSMRE with respect to such lands on the basis that they constitute "Indian lands."

the "remaining lands originally described in section 2 of Permit #NM-0001 are not Indian Lands" and therefore should be deleted from the permit.

However, in the March 9, 1987, memorandum accompanying the signed stipulations, counsel for OSMRE modified OSMRE's position as set forth in the stipulations, stating that P&M and OSMRE regarded the dispute as concerning OSMRE's assertion of jurisdiction over not only split estate lands but also "any allotted lands included within the original permit which are supervised by or held in trust for the Navajo Tribe within the meaning of Section 701(9) of [SMCRA]." Counsel for OSMRE further stated that his initial review of the permit had disclosed that certain lands were "allotted lands," which he identified, thus indicating that the question of the status of the allotted lands was presented.

The brief filed by OSMRE with the Hearings Division on April 13, 1987, however, reflects somewhat of a retreat by OSMRE from the position adopted in the stipulations. Thus, OSMRE stated, at page 5, footnote 2, that, while it still regarded allotted lands supervised by the Tribe as "Indian lands," it was "unaware of any facts which support the conclusion that any allotted lands within the McKinley Mine are 'supervised' by the Navajo Tribe." OSMRE concluded that it was, therefore, "not asserting Indian lands jurisdiction over any allotted lands within the McKinley Mine at this time." *Id.* OSMRE further stated that the "sole issue" before Judge Sweitzer concerned OSMRE's assertion of jurisdiction over the split estate lands and that P&M and OSMRE were agreed that the permit should be revised to adopt whichever position in that respect prevailed. *Id.* at 8. That the dispute concerned only OSMRE's assertion of jurisdiction over split estate lands was echoed in P&M's initial and reply briefs filed with the Hearings Division.

However, it has been the Tribe's unwavering position since its entrance into this proceeding that all of the lands included in section 2 of permit No. NM-0001 and regarded by P&M and OSMRE as non-reservation lands are actually "within the exterior boundaries of [a] Federal Indian reservation" and, thus, constitute "Indian lands" under section 701(9) of SMCRA subject to OSMRE's jurisdiction. We recognize that, at the time this case was finally submitted to Judge Sweitzer for resolution on the basis of the written briefs of the parties, P&M and OSMRE had agreed between themselves that the only issue that needed to be resolved concerned whether OSMRE had jurisdiction to issue a permit with respect to split estate lands. However, the fact that P&M and OSMRE had, thus, narrowed the issues between them does not foreclose the existence of other issues which must be resolved in order to fully decide the case because there is a third party (the Tribe) to the proceeding. It must be remembered that P&M's application for review of its permit originally challenged OSMRE's assertion of jurisdiction over all of the lands covered by section 2 of the permit with the exception of only those lands within the Navajo Indian Reservation. Therefore, P&M itself initially placed in issue the question of whether all of the non-reservation lands covered by section 2 of the permit constitute "Indian lands" and, thus, are subject to OSMRE's jurisdiction.

While the Tribe might be said to have initially intervened on the side of OSMRE, supporting OSMRE's assertion of jurisdiction over all of

the non-reservation lands described in section 2 of the permit on the basis that they constitute "Indian lands" within the meaning of section 701(9) of SMCRA, OSMRE's subsequent determination, with the concurrence of P&M, that only the split estate lands constitute "Indian lands" rendered its position adverse to that of the Tribe. Moreover, in view of the fact that the Tribe's intervenor status accords it all of the rights of a full party to this proceeding, including the right to independently maintain the case, the Tribe can alone continue to champion the contention that OSMRE has jurisdiction over non-reservation lands other than split estate lands where the permit includes those lands and remains unchanged. 11/ See United States v. United States Pumice Co., 37 IBLA 153 (1978), dismissed sub nom., The Wilderness Society v. Andrus, No. 79-0296 (D.D.C. May 30, 1979).

Furthermore, we do not believe that the question of what issues are proper for resolution in this administrative proceeding depends on when the Tribe entered the case, despite the contrary assertion by P&M and OSMRE, so long as the Tribe intervened prior to the final submission of the case to Judge Sweitzer. When issued, permit No. NM-0001 covered non-reservation lands, including split estate, allotted, and other lands. This constituted an assertion by OSMRE of jurisdiction over all of such lands, which assertion was challenged by P&M. The Tribe had at that time and continues to have an interest in maintaining that assertion of jurisdiction, which interest would be adversely affected by fulfillment of the position taken by OSMRE during the course of this proceeding, thereby siding with P&M, that it has no jurisdiction over such lands because they do not constitute "Indian lands" and thus the permit will be revised to delete such lands.

In view of the Tribe's interest, and because the Tribe in fact intervened before final submission of the case to Judge Sweitzer, its position cannot be ignored merely because the existing parties to the proceeding may have otherwise narrowed the focus of their original dispute prior to the time of intervention, but rather must be addressed. 12/ In so saying, we

11/ In its Appeal Brief, at page 50, P&M suggests that there were "constraints [placed] on the scope of the Tribe's intervention." We recognize that, under 43 CFR 4.1110(e), a person granted leave to intervene "may participate in [a] proceeding as a full party or, if desired, in a capacity less than that of a full party." Accordingly, "constraints" could conceivably have been placed on the Tribe's participation in the instant proceeding. However, none were. Rather, in his August 1986 order, Judge Sweitzer recognized the Tribe as a "party intervenor."

12/ It is clear from the record that, in any case, at the time the Tribe was permitted to intervene in this case, P&M and OSMRE had not defined the remaining issue. Indeed, the first statement indicating that the remaining issue concerned OSMRE's jurisdiction over only split estate lands not situated within the boundaries of the Navajo Indian Reservation appears in an Aug. 4, 1986, letter from counsel for P&M received by the Hearings Division on Aug. 7, 1986, the same day that Judge Sweitzer granted the Tribe's petition to intervene. Thus, we are not persuaded by P&M's and OSMRE's argument that, purportedly consistent with the rule enunciated in Vinson v. Washington Gas Light Co., 321 U.S. 489, 498 (1944), and elsewhere that an intervenor is not permitted to "enlarge a case which it enters * * * [but] takes the case as it is," the Tribe cannot raise any issues beyond whether

borrow from the well-established judicial rule that the original parties to a case cannot affect an intervenor's right to seek vindication of its position, even where those parties entered into a settlement agreement prior to intervention. See Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 695 (7th Cir. 1986); Raylite Electric Corp. v. Noma Electric Corp., 170 F.2d 914, 915 (2d Cir. 1948). To hold otherwise would unnecessarily fragment adjudication of the vital questions regarding the proper interpretation of section 701(9) of SMCRA presented by this case, contrary to the principle behind allowing intervention as a matter of right. See Nuesse v. Camp, 385 F.2d 694, 702 (D.C. Cir. 1967). Additionally, the de novo review authority contained in 43 CFR 4.1 vests in this Board the authority to review decisions as fully and finally as might the Secretary. Exxon Co., USA, 15 IBLA 345 (1974). Therefore, we are not precluded from reviewing the stipulations presented by the parties and rejecting them when appropriate. United States v. Williamson, 45 IBLA 264, 276, 87 I.D. 34, 41 (1980).

[4] Therefore, we turn to the question of whether the allotted and other lands covered by section 2 of permit No. NM-0001 constitute "Indian lands" within the meaning of section 701(9) of SMCRA, such that OSMRE had jurisdiction to issue the permit with respect to those lands. The Tribe would have us conclude that these lands are "Indian lands" by virtue of the fact they are all situated within the exterior boundaries of the Navajo Indian Reservation. We note that that question has, until fairly recently, never been decided in any administrative or judicial forum. However, the Tribe has referred us to the case of The Pittsburg & Midway Coal Mining Co. v. Saunders, No. 86-1442-M (D. N.M. Aug. 22, 1988), appeals filed, Nos. 88-2413 and 88-8071 (10th Cir.), in which the district court concluded that the area included in the Navajo Indian Reservation by Exec. Orders Nos. 709 and 744 "lies within the exterior boundaries of the Navajo Reservation," despite Exec. Orders Nos. 1000 and 1284 (Memorandum Opinion at 12). However, this decision was recently reversed by the United States Court of Appeals, which held that the "recognized boundary" of the reservation is the legal boundary. The court, thus, has rejected the tribe's arguments relating to the aforementioned executive orders. See Pittsburgh & Midway Coal Mining Co. v. Yazzie, Nos. 88-2413, 88-8071 (10th Cir. May 30, 1990).

In any event, it may be unnecessary to consider whether the allotted and remaining lands constitute "Indian lands" because they are within the exterior boundaries of the reservation, for such lands may still be regarded as "Indian lands" if they are "held in trust for or supervised by an Indian tribe," also within the meaning of section 701(9) of SMCRA. See Valencia Energy Co., supra at 59, 96 I.D. at 250.

In his June 1, 1987, decision, Judge Sweitzer concluded that the allotted lands are not "Indian lands," relying largely on the settlement

fn. 12 (continued)

OSMRE has jurisdiction over split estate lands (P&M Appeal Brief at 48). At the time the Tribe intervened, the "case" was clearly not limited to that issue.

agreement executed by the Secretary of the Interior and the State in connection with the case of New Mexico v. U.S. Department of the Interior, No. 84-3572 (D.D.C. Aug. 6, 1985), aff'd sub nom. Energy & Minerals Department v. U.S. Department of the Interior, 820 F.2d 441 (D.C. Cir. 1987). In that agreement, the Secretary stated, as a general matter, that he "does not consider individual Indian allot[t]ed lands outside the exterior boundaries of the [Navajo] Indian reservation to be included in the definition of 'Indian lands' contained in Section 701(9) of SMCRA." Energy & Minerals Department v. U.S. Department of the Interior, 820 F.2d at 444.

However, all that the settlement agreement decided was that lands cannot be considered "Indian lands" simply because they are allotted to individual Indians, as had previously been suggested by OSMRE in the preamble to rulemaking published at 49 FR 38463 (Sept. 28, 1984), which preamble the settlement agreement was designed to correct. See 53 FR 3993 (Feb. 10, 1988). Thus, as we noted in Valencia Energy Co., supra at 47-48 n.5, 96 I.D. 239 n.5, the Department of Justice and OSMRE have taken the position that, even after the settlement agreement in New Mexico, lands allotted to individual Indians may nevertheless be considered "Indian lands" if they are "held in trust for or supervised by an Indian tribe," within the meaning of section 701(9) of SMCRA. We, likewise, conclude that allotted lands may be considered "Indian lands" where they meet these statutory criteria.

As to whether the allotted lands are actually "held in trust for or supervised by an Indian tribe," Judge Sweitzer concluded initially that they are not held in trust for the Tribe, but rather for individual Indians. See Decision at 16. However, there is nothing explaining the basis for his determination that these lands are not actually "supervised" by the Tribe. Moreover, it is clear that the question of whether the allotted lands are "held in trust for or supervised by" the Tribe raises a question that cannot be resolved in the absence of a hearing. Accordingly, we must set aside Judge Sweitzer's June 1, 1987, decision to the extent that he concluded that the allotted lands are not "Indian lands" and remand the case for a hearing and decision on the question of whether the allotted lands are "Indian lands" because they are "held in trust for or supervised by" the Tribe. 13/

13/ We note that it is also the position of the Tribe that the allotted lands must be deemed to be "Indian lands" because they were expressly excepted from the arguable diminution in the size of the Navajo Indian Reservation caused by Exec. Orders Nos. 1000 and 1284 and thus retained their reservation character. See Tribe Opening Brief at 30-31.

Also, the Tribe takes the position that the allotted lands must be deemed subject to OSMRE's jurisdiction for purposes of the regulation of surface coal mining operations where such lands are otherwise recognized to be subject to Federal jurisdiction and section 710(h) of SMCRA, 30 U.S.C. § 1300(h) (1982), provides that "nothing in [SMCRA] shall change the existing jurisdictional status of Indian Lands." See Tribe Opening Brief at 31-34. We are not persuaded by this reasoning. As we indicated in Valencia Energy Co., supra at 66-67, 96 I.D. at 239, it was not intended by section 710(h) of SMCRA that the "status quo" with respect to jurisdiction over

In his June 1, 1987, decision, Judge Sweitzer effectively concluded that the non-reservation lands which the Tribe does not own and in which it has no beneficial interest are not "Indian lands," indicating that this was conceded by P&M, OSMRE, and the Tribe. We can find no such concession by the Tribe. Moreover, the fact that the Tribe has no interest in the lands does not necessarily resolve the question of whether they constitute "Indian lands" under section 701(9) of SMCRA. As we noted in Valencia Energy Co., supra at 65-66 n.13, 96 I.D. 239 n.13, it is "theoretically possible" that there exists a situation where lands are "supervised by an Indian tribe," even though the tribe has no ownership interest (or, presumably, no beneficial interest) in the lands, and that this might be sufficient to classify the lands as "Indian lands." Judge Sweitzer made no determination whether these lands constitute "Indian lands" on this basis. In the absence of a determination whether these lands are "supervised by" the Tribe sufficient to render them "Indian lands," we hold that it was improper for Judge Sweitzer to conclude that these lands are not "Indian lands." However, we deem it unnecessary to remand the case to Judge Sweitzer for that determination because the Tribe failed to allege either before him or before us on appeal that these lands are "Indian lands" because they are "supervised by an Indian tribe." Rather, the Tribe's contention that the lands are "Indian lands" is based solely on its assertion that they are within the exterior boundaries of the Navajo Indian Reservation. Thus, we will simply set aside that portion of Judge Sweitzer's June 1, 1987, decision holding that the lands in which the Tribe has no ownership or beneficial interest are not "Indian lands" within the meaning of section 701(9) of SMCRA.

Finally, we turn to the "grazing lands" which Judge Sweitzer, in his June 1, 1987, decision, concluded were "Indian lands" based on his conclusion that grazing on these lands, the surface and mineral estate of which is Federally owned, is administered by the Tribe under a cooperative agreement with BLM and the Bureau of Indian Affairs that renders the lands "supervised by an Indian tribe." See Decision at 17. On appeal, P&M and OSMRE challenge Judge Sweitzer's determination that these lands should be deemed "supervised by an Indian tribe." The arguments advanced by P&M and OSMRE indicate that there are paramount questions of fact regarding whether and the extent to which grazing on these lands is administered by the Tribe, which questions may best be resolved after a hearing. Indeed, OSMRE suggests in its initial brief submitted to the Board, at pages 15-16, that the Tribe does not administer grazing, as the "so-called 'grazing cooperative agreement,' which was never presented to [Judge Sweitzer], is nothing more than permission by the [F]ederal government for Tribal members to use the

fn. 13 (continued)

matters other than the regulation of surface coal mining operations would be determinative of who has jurisdiction concerning the regulation of surface coal mining operations where Congress, in enacting SMCRA, effectively created that jurisdiction out of whole cloth. At the time of enactment of SMCRA, Indian lands had no "jurisdictional status," vis-a-vis the regulation of surface coal mining operations, which could be changed by that Act. Thus, what was preserved by section 710(h) of SMCRA was jurisdiction with respect to these other matters. See S. Rep. No. 101, 94th Cong., 1st Sess. 86 (1975).

land until the Secretary decides to use the land for some other purpose." In addition, there is the question of whether such administration as exists amounts to the supervision contemplated by section 701(9) of SMCRA. That question has not been fully briefed by all of the parties.

Accordingly, we hereby set aside Judge Sweitzer's June 1, 1987, decision to the extent that he concluded that the grazing lands are "Indian lands" and remand the case to him for a hearing and decision on the question of whether these lands are "supervised by an Indian tribe," within the meaning of section 701(9) of SMCRA and, thus, constitute "Indian lands."

To summarize, we conclude that OSMRE had jurisdiction to issue permit No. NM-0001 and NOV No. 86-02-030-6 with respect to the split estate lands because those lands constitute "Indian lands" within the meaning of section 701(9) of SMCRA, and Judge Sweitzer's June 1987 decisions to the contrary are reversed. With respect to lands in which the Tribe does not have any ownership or beneficial interest, we conclude that Judge Sweitzer improperly decided that OSMRE has no jurisdiction to issue the permit in view of the possibility that these lands are supervised by the Tribe, and we, therefore, set aside his decision in that respect. Finally, we set aside Judge Sweitzer's decision to the extent he decided that OSMRE has no jurisdiction to issue the permit with respect to the allotted lands and the grazing lands because those lands may be "Indian lands" and remand the case to the Hearings Division for a hearing into whether such lands are being "held in trust or supervised by an Indian tribe." The Administrative Law Judge to whom the case is assigned shall issue a decision, which, in the absence of a timely appeal to the Board, will be final for the Department. With respect to the NOV, we reverse Judge Sweitzer's June 2, 1987, decision to vacate it and remand that case to him for further proceedings consistent with this opinion and the Board's decision in Valencia.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Sweitzer's June 1, 1987, decision is reversed in part and set aside in part, and the case is remanded to him for further action consistent herewith; Judge Sweitzer's June 2, 1987, decision is vacated and the case is remanded to him for further action consistent herewith.

James L. Byrnes
Administrative Judge

I concur:

David L. Hughes
Administrative Judge